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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1381

JOSEPH N. TOONI and DANIEL L. EDWARDS, JR.,
Petitioners,

v.

ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR FORCE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS CONTRA MEMORANDUM OF RESPONDENT

WILLIAM R. COEN
COEN & WAY
1117 Talbott Tower
Dayton, Ohio 45402
Counsel for Petitioners

Petitioners respectfully submit that the Court should consider this case timely filed.

The only reason the Clerk of the Supreme Court docketed the case on May 10, 1969 was that the Record from the Sixth Circuit Court of Appeals did not come into the physical possession of the Clerk until the morning of May 10, 1969.

Counsel for Petitioners ordered the Record on April 30, 1969, confirmed the request with the Deputy Clerk in the Sixth Circuit Clerk's Office the following day while counsel was in Cincinnati, and confirmed in writing the request, letter appended hereto.

The printer type-set, called counsel for Petitioners who drove from Dayton to Cincinnati and proof read the 74 page Petition, printed and mailed the necessary copies causing them to arrive at the Office of the Clerk of the Supreme Court at least 2 days prior to May 9, 1969.

Counsel for Petitioners at the same time filed his Proof of Service, Docket Fee and a letter requesting the Clerk to call him if there was anything else required to complete the filing.

In the meantime, about Monday, May 5, 1969, Counsel for Petitioners mailed a brief note to the Clerk of the Sixth Circuit reminding the Clerk of the importance of mailing the Record, if it had not already been mailed; and if there were any question to please call him.

While Counsel for Petitioners was attending a Seminar at the Ohio State Bar Association Convention, at the Neil House in Columbus, Ohio on Thursday, May 8, 1969 he received a message to call Mr. Shade at the Supreme Court, which counsel immediately did. Mr. Shade advised counsel that the Record had not yet been received and that perhaps it should be checked on.

Counsel immediately called the Clerk of the Sixth Circuit and was advised that the Record was "all ready to be

mailed." A discussion was had regarding whether or not the Record would arrive by the next day and the Deputy Clerk assured counsel that it would be there in time. Counsel then asked the Clerk to please send the Record Air Mail—Special Delivery, just to make sure, and the Clerk agreed.

Counsel then called Mr. Shade back and reported what had happened. Counsel even inquired whether it would be possible to give the Record, which was small, to Mr. Justice Byron White as he was scheduled as guest speaker for the Ohio State Bar Convention dinner meeting Friday evening, May 9, but Mr. Shade advised that a Petition for Certiorari was to be presented to the full Court and not to a single Justice. Further discussion was had and it appeared that the Record should arrive on time, especially if it were mailed "Air Mail—Special."

Counsel for Petitioners made an additional phone call to the Clerk of the Sixth Circuit and verified that the Record was being Air Mailed, Special Delivery. Counsel made a special point of the Special Delivery and requested the Clerk to mark on the outside of the envelope "Must be delivered prior to Midnight, May 9, 1969." The Clerk agreed to do so.

Subsequently, it was learned that the Sixth Circuit Clerk mailed the Record First Class—Registered, contrary to everything that had been discussed in numerous telephone conversations.

Under all of the facts and circumstances Petitioners respectfully submit that the Record be considered constructively received on time. Especially in light of the fact that the Record was at all times in the hands of the federal judiciary, except when enroute being handled by the federal post office system.

Petitioners have an extremely important interest in their cases and desire to be heard. A brief *amicus curiae* is being tendered on the merits.

The Petition should be considered timely filed.

Respectfully submitted,

WILLIAM R. COEN
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1117 Talbott Tower
Dayton, Ohio 45402

APPENDIX

(Letterhead)

Law Offices of
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William R. Coen
Robert C. Way
Robert A. Skinner
Robert E. Hunter

Area Code 513
224-1427

May 1, 1969

Mr. Carl W. Reuss, Clerk
United States Court of Appeals
For the Sixth Circuit
Cincinnati, Ohio 45202

Re: Joseph N. Tooni v. Eugene Zuckert, No. 18,228

Daniel L. Edwards, Jr. v. Eugene Zuckert, No. 18,229

Gentlemen:

This is to confirm my telephone conference with your office this date to the effect that we are filing a Petition for a Writ of Certiorari in the above cases.

Accordingly, we will appreciate it if you will please forward to the United States Supreme Court the original record in both Tooni and Edwards, together with any other papers required by law.

Thank you.

Very truly yours,

COEN & WAY
William R. Coen

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PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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August 18, 1969

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1381

JOSEPH N. TOONI and DANIEL L. EDWARDS, JR.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Petitioners respectfully request that this Court grant rehearing of its order dated June 23, 1969, which denied certiorari, and that the Court now grant certiorari.

An extension of time until August 18, 1969, for filing the petition for rehearing was granted by your Court on July 16, 1969.

REASONS FOR GRANTING THIS PETITION FOR REHEARING

Petitioners desire to submit arguments that apply to both cases, and also to submit arguments applicable to the Petitioners separately.

Reasons Applicable To Both Petitioners Petition For Writ of Certiorari Should Be Considered Timely Filed

The order of June 23, 1969 granted leave to District Lodge, 23, International Association of Machinists and

Aerospace Workers for leave to file its brief, as amicus curiae. The order then went on to deny certiorari. It is not possible to determine from this order whether the Court ruled on the petition for certiorari on the merits or not. Petitioners submit that if the petition was denied for procedural reasons, such as the failure of the Record to arrive on time due to the failure of the Clerk of the Sixth Circuit mailing the Record Air Mail—Special Delivery, as requested by counsel for Petitioners, that the Court consider the petition for certiorari timely filed, for the reasons stated in Petitioners Reply Brief previous filed.

It would truly be a miscarriage of justice to deny certiorari to sustain the removal of the Petitioners from the federal service based upon the failure of the Deputy Clerk in the Sixth Circuit to properly mail the Record as requested by counsel. Two wrongs do not make a right, yet unless this petition is granted, Petitioners will be barred from reinstatement to their government positions due to the misfeasance of a Deputy Clerk. Is this justice? We believe the petition has been considered timely filed; but there is no way to determine this from the order of June 23. If the Court did not consider the petition timely filed, we urge that the Court should do so, and grant the petition for certiorari in order that the case may be heard on the merits.

Summary Judgment Improperly Awarded Respondent

Petitioners desire to point out a matter which was apparently not brought to the attention of the Court previously. In the District Court, when the government moved for summary judgment, Petitioners moved for summary judgment, reserving their rights to a trial for determination of factual issues, if summary judgment were not awarded in favor of Petitioners. In other words, Petitioners did not waive their right to a trial of the factual

questions, as outlined on Pages 30 and 31 of the Petition for Certiorari. The cited case of *Weinberg* v. *Macy*, 360 F.2d 816 (CA, D.C. 1965) and *Jenkins* v. *McKeithen*, 89 S.Ct. 1843, June 9, 1969, which has not been cited previously, reflect the established law to the effect that summary judgment must not be used to deprive a litigant of his right to a trial of factual issues. The Court stated in *Jenkins*, at Page 1849 of the Supreme Court Reporter:

> "For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. (Citations omitted.) And, the complaint is to be liberally construed in favor of plaintiff. See Fed. Rule Civ. Proc. 8(f); *Conley* v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The complaint should not be dismissed unless it appears that appellant could 'prove no set of facts in support of his claim which would entitle him to relief.' *Conley* v. *Gibson*, supra, at 45-46, 78 S.Ct. at 102."

As will be discussed under the Separate Arguments of Petitioners, there are numerous issues of fact which preclude a summary judgment against Petitioners.

SEPARATE ARGUMENT OF JOSEPH N. TOONI

Failure of District Judge To Consider Supplemental Affidavit

Petitioner Tooni has at least two arguments which have not been previously brought to the attention of this Court. Both reasons are extremely important and compel a granting of certiorari in this case.

On June 30, 1967, Petitioner Tooni signed a Supplemental Affidavit, copy attached, which was taken to the District Court almost simultaneously with the issuance of the Decision by Judge Weinman on July 3, 1967. It is not clear whether the Record of the District Court before the

District Judge included this Supplemental Affidavit, which contained vital and important information regarding the withdrawal of certain papers from Mr. Tooni's file. It is the opinion of counsel for the Petitioner, that the District Court did not consider this Supplemental Affidavit, and had the District Court done so, Judge Weinman would have required a trial of the factual issues involved (withdrawal of papers from 201 file).

Failure of District Court To Grant Hearing On Factual Questions

The determination of whether or not Petitioner Tooni's Form 57 was fraudulent must stand or fall upon the Affidavit of said Petitioner attached to his Motion for Summary Judgment. However, the government submitted no affidavit to contradict Petitioners detailed affidavit. Query: How could the District Judge grant summary judgment in favor of the Government, when, the factual matters involved were all sworn to by Petitioner Tooni in his detailed affidavit which explained away every iota of fraud or misrepresentation?

Factual Question Of Whether Or Not Form 57 Was Ever Submitted As Claimed By The Government

Petitioner Tooni desires to point out another argument which has not been presented previously to this Court. Early in the Appeal of Mr. Tooni, a statement was given to a Civil Service Commission investigator. This statement explained that the items contained in the alleged fraudulent Form 57 were, in fact, never made a part of the Form 57 at all. This statement was no doubt relied upon by the Chicago Regional Office of the Civil Service Commission in making its findings that there was no fraudulent Form 57 submitted by Mr. Tooni. Somewhere in the maze

of paper work which has transpired since the Chicago Region's favorable decision, this fact has been obscured. The facts are that Petitioner Tooni was urged by a fellow employee to "add" experience information to his Form 57; that Mr. Tooni had outlined various courses and hours attended, *not denominating the hours as credit hours* and as this information was being assembled, and not made a part of the Form 57 of Petitioner Tooni, one Capt. Carlson removed this information from a typewriter and used it against this Petitioner as items which were part of his Form 57, when, in fact, they were never made a part of the Form 57 by Mr. Tooni.

Petitioner respectfully represents that there have been irregularities in the procedural steps of his case including removing items from his 201 file and the addition of certain items to his Form 57, without his authority, and that the resulting sabotage of his records has now resulted in his removal from the federal service.

As stated in Petitioners Affidavit attached to his Motion for Summary Judgment he "at no time had any intent to defraud or misrepresent anything on his SF-57 . . . that he never intentionally misrepresented any material fact."

Petitioner Tooni states that he has suffered irreparable harm to his reputation by reasons of his removal, and severe damage to his ability to obtain responsible positions, due to credit reports which indicate a removal for fraudulent misrepresentation; that he actually never made these alleged misrepresentations a part of his Form 57, and that his sworn affidavit explaining the hours and credits of various courses has never been disputed.

Accordingly, Mr. Tooni is entitled to a trial for a determination of the facts regarding the above procedural errors and substantive issues which have been resolved against him in an arbitrary and capricious manner.

SEPARATE ARGUMENT FOR PETITIONER DANIEL L. EDWARDS, JR.

Petitioner Edwards desires to bring to the Courts attention the recent case of *Norton* v. *Macy*, USCA DC, No. 21,625, July 1, 1969. This case involved the removal of an alleged homosexual. The Court stated that a finding of immoral or indecent conduct of an employee is not grounds for removal without some ascertainable deleterious effect on the efficiency of the service.

> "Thus, we think the efficiency of the charges against appellant must be evaluated in terms of the effects on the service of what in particular he has done or has been shown to be likely to do."

Again, the District of Columbia seems to be granting meaningful judicial review of illegal removal of federal employees. This argument was made on Page 13 of the Petition for Certiorari, quoting *Louks* v. *United States*, 395 F.2d 993 (Ct. Cl. 1968) and *Scott* v. *Macy*, 349 F.2d 182 (CCA, D.C. 1965). The *Norton* case was decided after certiorari was denied in this case. The result is untenable. In *Scott* and *Norton*, we have alleged homosexuals being granted judicial relief, but Petitioner Edwards who has borne the brunt of numerous procedural errors is being removed for alleged inefficiency which arose out of this valuable employee's complaint that he had insufficient work to do, and he was tired of watching Bob Hope movies.

Petitioner Edwards desires to bring to the Court attention the argument of the brief amicus curiae filed herein regarding the separation of powers doctrine. In the case of *Adam Clayton Powell, Jr.* v. *McCormack*, 89 S.Ct. 1944 (June 16, 1969) this Court determined that it should set aside the action of the Congress of the United States and its resolution excluding member-elect Powell from the House of Representatives. True, there are diverse issues,

but there are also similar issues involving the separation of powers. Judicial review was afforded the legislative action in *Powell.* The Court stated at Page 1955 of the Supreme Court Reporter:

> "That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision."

Is not the Executive Branch of the Government also subject to judicial review?

Petitioner submits that he is entitled to the same strength and protection of the separation of power doctrine as Adam Clayton Powell. Petitioner submits that the argument of the brief amicus curiae is now expressly applicable in light of the *Powell* decision.

Petitioner Edwards would stand on top of the Capitol Building in Washington, or on top of the Washington Monument, or in the court room of this Court, if he were only given the opportunity to show the numerous procedural errors which entitle him to reinstatement to his job, or at least a trial to determine the factual issues involved.

Petitioner Edwards' Amended Motion for Summary Judgment in the District Court, was in the alternative, Petitioner requesting a trial, if summary judgment was not awarded in his favor. The District Court states in its brief decision that certain facts were not denied by Plaintiff, and that the required procedural steps were followed in his removal. Petitioner Edwards submits that this finding by the District Judge constitutes *reversible error.* Said Petitioner submitted to the District Judge a nine (9) page memorandum explaining the true chronology of the events and listing numerous procedural violations by the Air Force of its own regulations. See *Service* v. *Dulles,* 354 U.S. 363 (1957), which held: